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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 568.

WILLIAM J. BATTEN AND KATIE M. BATTEN
HIS WIFE ET AL.,
Petitioners

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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QUESTION PRESENTED

Petitioners believe that the question presented as set forth in the Brief of the United States in Opposition is incorrect, and that the true question presented is that set out in the Petition for Certiorari at p. 3, to-wit:

> "Whether the action of the United States in directing against and across private residential property, loud

and continuous noises and strong vibrations, accompanied by smoke, soot and unpleasant odors, so as to place upon such private properties a direct, permanent and substantial burden not substantially shared by the general public, consititutes a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States."

STATEMENT

The statement contained in the Brief of the United States in Opposition conveys the impression that all activities complained of take place 2,000 feet or more from petitioners' properties (Br. p. 3, p. 5). This is incorrect. The edge of the aircraft ramp and parking area is 650 feet from plaintiffs' closest homes and is 900 feet wide (Pet. App. p. 22). Aircraft engines are started *on this ramp* 30 minutes prior to take off time and are taxied to the warm up pad approximately 20 minutes prior to take off time. (Pet. App. p 22). Auxiliary ground power units are frequently operating from 8 to 10 hours at a time *on the aircraft parking ramp*, and there are commonly from four to ten of these units operating at once (Pet. App. p. 84).

ARGUMENT

The United States seeks by its argument to find support in the case of *Richards* v. *Washington Terminal Co.*, (1914) 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088, by taking the position that in *Richards* the recovery was allowed only for such smoke and gases as were specifically directed at the injured landowners property, and that nothing comparable occurs in the instant case. The case does not support the argument, for the court in *Richards* pointed out that Richards was a neighboring, *though not adjacent*, land-

owner. It is patently obvious that there had to be one or more intervening landowners and therefore the smoke and gases from the offending tunnel exhaust system could *not* have been specifically directed at Richards. The fact is that the court in *Richards* followed the earlier decision of *Baltimore and Potomac Railroad Company* v. *Fifth Baptist Church*, (1883) 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739, wherein recovery was granted for the noise, vibration, smoke and soot arising from an engine house. Clearly, nothing was said in that case about any of these injurious elements being specifically directed at the Church. There, as in the *Richards* case and in the case now before the court, the critical factor was that the offending activity had been so localized and concentrated in one area as to place on the neighboring landowner a burden much greater than that shared commonly by the public as a whole.

Respondent interjects the case of *United States* v. *Causby*, (1946) 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, as being consistent with the decision of the lower court. *Causby* was a different case entirely. It determined liability for the taking of an avigation easement over private land, and was not at all concerned with a factual situation such as raised herein. It is important to note, however, that this court in *Causby* did not simply hold, as the United States and the courts below have insisted, that the mere flying of planes through the column of air directly above certain land constituted a taking. The court in fact held at p. 266 of the official report:

> "Flights over private land are not a taking, unless they are so low and so frequent as would be a *direct and immediate interference with the enjoyment and use of that land.*" (Emphasis supplied).

The decision was thus predicated on the impact upon the *use and enjoyment* of the land, rather than the relative posi-

tion of the aircraft, a rationale pointed out by Mr. Justice Black when he said in dissent at p. 269:

> "Consequently it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property."

Respondent cites *Matson* v. *United States*, (Ct. Cl. 1959) 171 F. Supp. 283, for authority that under *Causby* shock waves traveling more than 500 feet cannot consummate a a taking. *Causby* did not so hold. The 500 foot level above the landowners property in *Causby* was the lower reach of the public navigable airspace. Since the flights there were below that level, this court specifically *declined* to rule on the situation that would be presented if flights above that level had the same effect. In any event, it would seem totally inconsistent with any concept of justice to suggest that private citizens may be subjected to identical burdens, and yet receive totally opposite treatment at the hands of the courts because of an intervening line measuring an arbitrarily determined number of feet. If this should be held the rule, it would be truly a landmark decision, for never before has justice been measured in feet and inches.

2. Respondent argues that this court has laid down a clear rule that a direct invasion of private property is essential to a taking, and that this can only be accomplished by the projection of some instrumentality on or over the land. Assuming, *arguendo*, that the "direct invasion" test is the sole test of a taking, it is patent that this court has *never* held that such an invasion can be effected only by penetration by some object or instrumentality. Such an interpretation is inconsistent with the fact that this court spoke in terms of an invasion of private property when discussing the smoke and gases in *Richards*, and treated of the noise and vibration in *Baptist Church* in terms of a taking of private property without ever mentioning the term "inva-

sion". It is worthy of note that a taking may be accomplished by regulation, as noted in *Pennsylvania Coal Company* v. *Mahon*, (1922) 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322, and *United States* v. *Central Eureka Mining Co.*, (1958) 357 U.S. 155, 78 S. Ct. 1097, 2 L. Ed. 2d 1228. It would appear that the only way in which the many decisions involving a "taking" may be rationalized is by recognizing that historically when this court has referred to an "invasion", it spoke in terms of *rights* rather than tangible, visible property. Hence the test which may be universally applied to all cases in determniing whether a taking has occurred is not the "invasion" test, but rather the test which only requires a determination whether the burden is borne by the public as a whole, or has been unfairly shifted to the shoulders of the few. The rationale of such a test was reiterated recently by Mr. Justice Black in *Griggs* v. *Allegheny County*, (1962) 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585, where he said (Dissenting on grounds inapplicable here) at p. 94, "* * * it would be unfair to require petitioner and others who suffer serious and peculiar injuries by reason of these transportation flights to bear an unfair proportion of the burdens of air commerce * * *" Petitioners submit that their situation, with the continuing subjection to sound pressure levels in excess of those levels at which the United States requires ear plugs for its personnel, sleepless nights, and myriad other factors found by the District Court, qualifies them for inclusion among the "others who suffer serious and peculiar injuries".

3. Since the filing of the Petition for Certiorari herein, the Supreme Court of Oregon has rendered its decision in *Thornburg* v. *Port of Portland*, (1962) 75 Adv. Sh. 375, Ore. , 376 P.2d 100. The question before that court was very like the question here, in that it was necessary to determine whether a taking of private property

could occur as a result of noise and vibrations from aircraft on or above *neighboring* land. The Oregon Court held that such a taking could occur, and in the course of its opinion commented at length on the decision below in this case, saying at p. 382:

> "In view of the importance of the question presented in the *Batten* case, and in view of the strong dissent by the chief judge, it would be premature to speculate now upon the final direction the federal courts will take. We believe the dissenting view in the *Batten* case presents the better-reasoned analysis of the legal principles involved, and that if the majority view in the *Batten* case can be defended it must be defended frankly upon the ground that considerations of public policy justify the result: i. e., that private rights must yield to public convenience in this class of cases. The rationale of the case is circular. The majority said in effect that there is no taking because the damages are consequential, and the damages are consequential because there is no taking."

The Oregon Court, with regard to the "taking vs. damage" argument, offered here by Respondent in its brief at p. 6, recognized this distinction but said at p. 389:

> "As noted above, this court has expressed a policy against allowing compensation in several situations where there was no actual physical injury to the real property. The cases used terms such as 'these are only consequential damages', or 'there was damage here but not sufficient to be a taking', or 'these are damages *damnum absque injuria*.' Such expressions describe conclusions that the court reached when it had decided that the facts involved did not measure up to the standard necessary for a 'taking'. Such injuries were then held to be noncompensable as a matter of law, under the policy against allowing compensation for mere 'damages'. Such decisions, which were no doubt right in cases of single-instance wrongs, prove too much when applied to continuing and substantial interference

with the use and enjoyment of property. Ordinarily, in a case of continuing interference, whether it is substantial enough to constitute a taking will be for the jury to determine."

Thus the Supreme Court of Oregon has taken a position diametrically opposed to the position of the court below herein. This decision, coupled with the sharp dissent of Chief Judge Murrah below, points clearly to the importance of the legal principle now laid before this court, and to the marked divergence of opinion on the law among eminent jurists today.

CONCLUSION

Petitioners submit that the importance of the question presented, the divergence of views below, and the conflict with prior decisions of this court demonstrate that the deciison below should be reviewed by this court, and respectfully pray that their petition for certiorari be granted.

Respectfully submitted,

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